IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT MARTINSBURG

STEVEN E. FRADDOSIO

Plaintiff,

v. **Case No. 3:10-cv-87**

PROCTOR FINANCIAL, INC., and CLAIM ADJUSTMENT SPECIALISTS, INC.

Defendants.

NOTICE OF REMOVAL BY DEFENDANTS

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Pursuant to 28 U.S.C. § 1441 and § 1446, Defendants Proctor Financial, Inc. ("Proctor") and Claim Adjustment Specialists (incorrectly identified in the Complaint as Claim Adjustment Specialists, Inc., and hereinafter referred to as "CAS") hereby remove this action, which is now pending in the Circuit Court of Berkeley County, West Virginia, to the United States District Court for the Northern District of West Virginia. As will be shown below, this Court has original jurisdiction over this matter pursuant to diversity jurisdiction under 28 U.S.C. § 1332 (a), because the amount in controversy exceeds $75,000.00, exclusive of interest and costs, and the action is between citizens of different states. In support of this removal, Defendants Proctor and CAS state as follows:

I. VENUE

Plaintiff Steven Fraddosio filed this action in the Circuit Court of Berkeley County, West Virginia, Civil Action Number 10-C-653. Since the case was filed in Berkeley County, this Court is the appropriate venue for removal.

II. TIMELINESS OF NOTICE OF REMOVAL

Plaintiff served Defendants via the West Virginia Secretary of State on August 19, 2010. Pursuant to the second paragraph of 28 U.S.C. § 1446(b), this Notice of Removal is being filed less than 30 days after receipt of service of process (as defined by Rule 6 of the Federal Rules of Civil Procedure), and less than 1 year after the commencement of the action. This Notice of Removal is therefore timely.

III. DIVERSITY OF CITIZENSHIP

According to the Complaint, Plaintiff Steven Fraddosio is a resident of West Virginia. Defendant Proctor is a Michigan corporation with its principal place of business in Michigan. Defendant CAS is the operating name of a Texas limited partnership with its principal place of business in Texas. Therefore, complete diversity exists among the parties.

IV. AMOUNT IN CONTROVERSY

Although Plaintiff has pled no specific damage amount in his Complaint, the amount in controversy in this action exceeds $75,000.00 due to this fact: If Plaintiff were to win this lawsuit, and receive all of the compensatory and punitive damages he seeks from Defendants Proctor and CAS, the total amount of the damages would exceed $75,000.00.

According to the Complaint, Plaintiff is suing Defendants Proctor and CAS because the house in which he lives experienced a fire on August 3, 2009. He alleges that he is the insured under an insurance policy that covers the home in question. However, Defendants Proctor and CAS dispute that Plaintiff is the insured under the policy in question. Plaintiff alleges that the claims adjuster hired by Proctor and CAS estimated the total property loss at $16,159.41, and that in Plaintiff's view, that figure "grossly underestimated" the damages sustained in the August 3, 2009 fire. Defendants Proctor and CAS dispute that any estimates made by the claims adjuster in question were grossly underestimated. Finally, Plaintiff alleges that, in their handling of the claims under the insurance policy in question, Defendants Proctor and CAS have breached the insurance contract, violated the West Virginia Unfair Trade Practices Act, and violated the implied duty of good faith and fair dealing, thereby causing him harm. Defendants Proctor and CAS clearly dispute this allegation as well.

In his Complaint, Plaintiff seeks compensatory damages against Defendants Proctor and CAS for the following:

- Further insurance policy proceeds to compensate him for the damages directly caused by the fire, in an undetermined amount, but regarding which $16,159.41 is a gross underestimate (according to Plaintiff)
- Additional living expenses, as a result of not being able to live in the home following the fire
- Costs of measures taken by Plaintiff to mitigate damage to the home following the fire
- Reimbursement for labor exerted by Plaintiff in cleaning up the home following the fire
- Annoyance
- Inconvenience
- Emotional distress
- Mental anguish
- Inconvenience
- Humiliation
- Embarrassment
- Aggravation
- Attorney's fees and litigation costs and expenses
- Other general damages
- Punitive damages

Despite the lack of a specific ad damnum in Plaintiff's Complaint, the amount in controversy in this action exceeds $75,000.00. At the core of this lawsuit is the fact that Mr. Fraddosio did not purchase the insurance policy in question. This insurance policy was purchased by Mr. Fraddosio's mortgage lender, the United States Department of Agriculture ("USDA"), to protect its own interests in the home in question, because Mr. Fraddosio failed to maintain homeowner's insurance on the home. The insurance policy does not provide any insurance benefits directly to Mr. Fraddosio. Mr. Fraddosio obviously disputes this (hence, his lawsuit). So, at the onset, this lawsuit involves an insurance coverage dispute. The limits of liability under the insurance policy in question are $66,095.00 for the home itself and $6,609.50 for other structures, for a total of $72,704.50. This figure represents the entire financial interest that the USDA had in the Fraddosio home. Therefore, the amount of potential insurance coverage that is at issue in the insurance coverage dispute between Plaintiff and the Defendants is $72,704.50. Combined with the other types of compensatory and punitive damages Plaintiff seeks in his Complaint, this coverage amount at issue clearly means that the total amount in controversy in this case exceeds $75,000.00.

Plaintiff characterizes the claims adjuster's estimate of the damage in question, $16,159.41 as a gross underestimation of the real damages at issue. Whatever damages figure Plaintiff would consider to be adequate, it must far exceed $16,159.41 in order for that figure to qualify as a gross underestimation. On top of the unknown figure that Plaintiff would consider to be an adequate damages estimate for the home, he claims entitlement to reimbursement for additional living expenses, the cost of mitigation measures he took to prevent further harm to the home, and reimbursement for his labor in cleaning up the home following the fire. He further seeks attorney's fees (which tend to be 1/3 of any amount in controversy) and litigations expenses. He further seeks damages for annoyance, inconvenience, emotional distress, mental anguish, inconvenience, humiliation, embarrassment, and aggravation, all caused by what he claims is misconduct by the Defendants. Finally, he seeks punitive damages.

Judge Hallanan of the United States District Court for the Southern District of West Virginia dealt with a similar "amount in controversy" question in Weddington v. Ford Motor Credit Company, 59 F. Supp. 2d 578 (S.D. W. Va. 1999). In that case, Plaintiff had sued an automobile financing company. The complaint did not contain any specific amount in the ad damnum clause. The only firm amount in controversy that could be gleaned from the case file was $16,000.00, the value of rescission of the contract in question. However, because Plaintiff was also requesting compensatory damages for mental anxiety, suffering, annoyance, aggravation, inconvenience and humiliation, as well as punitive damages, Judge Hallanan found that the amount in controversy would likely be above $75,000.00, the jurisdictional limit.

In Cline v. Matney, 20 F. Supp. 2d 977 (S.D. W. Va. 1998), Judge Haden reached the same conclusion regarding a lawsuit against a tortfeasor and his insurance company. The complaint alleged that the tortfeasor had caused personal injury to the plaintiff, and that the tortfeasor's insurance company had violated the Unfair Trade Practices Act, West Virginia Code § 33-11-4, *et seq.* in its dealings with plaintiff. While the complaint did not contain a request for any specific dollar figure, it requested both compensatory and punitive damages. Judge Haden found that, with medical bills over $30,000.00, and a request for punitive damages, the amount in controversy would likely be above $75,000.00.

In Campbell v. Rests. First/Neighborhood Rest. Inc., 303 F. Supp. 2d 797 (S.D. W. Va. 2004), Judge Haden reached a similar conclusion in a personal injury case that involved less than $20,000 in medical bills. The plaintiff in that case only sought compensatory damages, not punitive damages; yet, the amount in controversy requirement was satisfied. "Although her medical bills total just shy of $20,000, when one considers the additional elements of pain and suffering and future damages, one can easily conclude the amount in controversy is satisfied." Campbell, id., at 799.

Judge Johnston reached a similar decision in Evans v. CDX Services, LLC, 528 F. Supp. 599 (S.D. W. Va. 2007). In that case, the plaintiff sought compensatory damages, but not punitive damages, for personal injury. With no indication of the amount of medical bills at issue, Judge Johnson found that the plaintiff's claims for pain and suffering and future damages placed the amount in controversy above $75,000.

In this matter, it is highly likely that the amount in controversy exceeds $75,000.00. This Court has original jurisdiction, and this matter is properly removed to federal court.

V. CONSENT OF ALL DEFENDANTS TO REMOVAL

There are only two defendants, and they are the removing parties. Therefore, all defendants join in this notice of removal.

PROCTOR FINANCIAL, INC. and
CLAIM ADJUSTMENT SPECIALISTS

BY: SPILMAN THOMAS & BATTLE, PLLC

s/ Don C. A. Parker

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CERTIFICATE OF SERVICE

I, Don C. A. Parker, hereby certify that on September 17, 2010, I electronically filed the foregoing "**Notice of Removal by Defendants**" with the Clerk of the Court using the CM/ECF filing system. I also hereby certify that I have placed a true copy thereof in an envelope deposited in the regular course of the United States Mail, with postage prepaid to the following:

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Counsel for Plaintiff

s/ Don C. A. Parker
Don C.A. Parker, Esq. (WV State Bar # 7766)